Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–5 OF 2007(S)

ABDUL HAMID MOHAMAD CHIEF JUSTICE, ARIFIN ZAKARIA AND HASHIM YUSOFF FCJJ

2 JULY 2008

Administrative Law — Judicial review — Application for — Whether judicial review proceedings may be taken against appellant to compel payment of judgment sum as certified in certificate issued under s 33(1) of the Government Proceedings Act 1956 — Whether order of mandamus may be issued against appellant

The respondent had obtained a monetary judgment at the High Court of Sandakan against the State Government of Sabah ('the state government') for breach of an agreement entered into by the respondent and the state government. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s 33(1) of the Government Proceedings Act 1956 ('GPA') against the state government but the latter did not make payment as required by the certificate. The respondent thereafter filed an ex parte application for leave for judicial review for an order of mandamus pursuant to O 53 of the Rules of the High Court 1980 ('RHC') against the appellant, to pay the judgment sum in accordance with the said certificate. When leave was granted, the respondent proceeded to file the substantive application for a judicial review for the order of mandamus. The High Court dismissed the application and held that the respondent's application under s 33(3) of the GPA was prohibited by s 33(4) of that Act. On appeal to the Court of Appeal, the court allowed the appeal because it was of the view that s 33(4) of the GPA, s 44(1) of the Specific Relief Act 1950 ('SRA') and O 73 r 12 of the RHC are no impediments to the respondent's application. It therefore allowed the respondent's application for judicial review and directed the appellant to make payment of the judgment sum within 21 days from the date of the order. As a result, the appellant obtained leave to appeal to this court on a single issue of law, which was whether judicial review proceedings may be taken against the appellant to compel payment of a judgment sum as certified in the certificate issued under s 33(1) of the GPA.

Held, dismissing the appeal with costs:

(1) (per **Abdul Hamid Mohamad Chief Justice** and **Arifin Zakaria FCJ**) Once a certificate is issued under s 33(1) of the GPA and duly served on the state government it was then obligatory on the state government to make the necessary payment. This was because the State Government had a statutory duty under s 33(3) of the GPA to pay the amount as certified. It was not a matter of discretion for the government whether to pay or not to pay. However, s 33(4) of the GPA opens with the words 'save as aforesaid', which clearly indicates that there cannot be any enforcement of money judgment against the government. In other words the only method provided by the GPA to recover a judgment sum is by the issue of the certificate, as ordinary execution proceedings are not available against the government (see paras 7, 50, 72 & 92).

(2) (per **Abdul Hamid Mohamad Chief Justice** and **Arifin Zakaria FCJ**) Furthermore O 73 r 12(1) of the RHC has made it clear that the general policy of the law is that execution or other processes of enforcement do not lie against the government. In other words, as against a government one cannot resort to any of the procedures pertaining to the enforcement of judgments and orders provided by O 45 to O 52 of the RHC. The only procedure allowed is as provided by s 33 GPA (see paras 11 & 54).

(3) (per **Arifin Zakaria FCJ**) The respondent was merely seeking the assistance of the court to get the state government to satisfy the judgment sum which was obtained as long ago as 2002. The chronology of events in this case clearly showed that the demands for payment from the respondent received an indifferent response from the government or its agency. The response was a clear reflection of the little respect, if any, that the government has for the certificate. In the circumstances, the court was not helpless or powerless to put right what is plainly wrong in law. Although ordinary execution proceedings are not available against the government by virtue of s 33(4) of the GPA, these execution proceedings are limited to the type of 'execution or attachment' as set out in O 45 to O 52 of the RHC and do not include judicial review proceedings. This is because if the Legislature had intended to include judicial review proceedings within the scope of s 33(4) of the GPA it could have done so in clear words. Since the authorities cited clearly showed that judicial review could lie against a Minister, the appellant as the Minister in charge of financial matters was naturally responsible for the payment of the judgment sum. By definition an order of mandamus is a command issued by the court to an authority to perform a public duty placed upon it by law and this duty is the statutory duty under s 33(3) of the GPA to pay the judgment sum as stated in the certificate (see paras 47, 63, 74, 81–82 & 94–96).

(4) (per **Arifin Zakaria FCJ**) Lack of funds was no excuse not to pay the judgment sum, as art 29(2) of the Constitution of the State of Sabah stipulates that any moneys required to satisfy any judgment, decision or award against the state by any court or tribunal shall be charged and paid out of the consolidated fund. Therefore, the money need not be provided for through any supply bill, as it was chargeable directly to the state's consolidated fund. Thus there was no excuse for the appellant not to comply with the certificate issued under s 33(3) of the GPA (see para 96).

(5) (per **Abdul Hamid Mohamad Chief Justice**) The appellant although 'a member of the administration' was not a 'person holding public office' for the purposes of s 44 of the SRA. This means that s 44 of the SRA is not applicable to the appellant and does not empower the court to make an order against the appellant. To that extent the High Court was right and the Court of Appeal was wrong in its interpretation of s 44 of the SRA (see para 24)

(6) (per **Abdul Hamid Mohamad Chief Justice**) However, s 25(2) of the CJA provides additional powers ie additional to any other power given by other written laws and as such they can only be more than what has already been provided for by other laws and not limited to what are provided in other written laws. Thus, it is not correct to read s 25(2) as subject to or limited to what is provided in the GPA or the SRA. In para 1 of the Schedule of the CJA mandamus is mentioned as one of the additional powers that may be issued to 'any person or authority' and this includes a Minister of a government (see paras 30–31).

[Bahasa Malaysia summary

Responden telah mendapatkan penghakiman kewangan di Mahkamah Tinggi Sandakan terhadap Kerajaan Negeri Sabah ('kerajaan negeri') kerana melanggar perjanjian yang dimasuki oleh responden dan kerajaan negeri. Responden kemudian telah memohon dan memperoleh sijil jumlah penghakiman dan perintah untuk kos menurut s 33(1) Akta Prosiding Kerajaan 1956 ('APK') terhadap kerajaan negeri tetapi kerajaan negeri tidak membuat bayaran seperti yang dikehendaki oleh sijil itu. Responden kemudian telah memfailkan permohonan ex parte untuk kebenaran membuat semakan kehakiman untuk perintah mandamus menurut A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap perayu, untuk membayar jumlah penghakiman menurut sijil tersebut. Setelah kebenaran diberikan, responden terus memfailkan permohonan substantif untuk semakan kehakiman untuk perintah mandamus. Mahkamah Tinggi telah menolak permohonan itu dan memutuskan bahawa permohonan responden di bawah s 33(3) APK dihalang oleh s 33(4) Akta tersebut. Atas rayuan

ke Mahkamah Rayuan, mahkamah membenarkan rayuan itu kerana ia berpendapat bahawa s 33(4) APK, s 44(1) Akta Relif Spesifik 1950 ('ARS') dan A 73 k 12 KMT bukan penghalang untuk permohonan responden. Oleh itu ia membenarkan permohonan responden untuk semakan kehakiman dan mengarahkan perayu membuat bayaran untuk jumlah penghakiman dalam tempoh 21 hari dari tarikh perintah tersebut. Akibatnya, perayu telah memperoleh kebenaran untuk merayu ke mahkamah ini atas satu isu undang-undang, iaitu sama ada prosiding semakan kehakiman boleh diambil terhadap perayu untuk membuat bayaran jumlah penghakiman seperti yang disahkan dalam sijil yang dikeluarkan di bawah s 33(1) APK.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdul Hamid Mohamad KHN** dan **Arifin Zakaria HMP**) Setelah sijil dikeluarkan di bawah s 33(1) APK dan telahpun disampaikan ke atas kerajaan negeri ia adalah tanggungjawab kerajaan negeri untuk membuat bayaran yang perlu. Ini adalah kerana kerajaan negeri mempunyai tanggungjawab statutori di bawah s 33(3) APK untuk membayar jumlah seperti yang disahkan. Ia bukan perkara tentang budi bicara untuk kerajaan sama ada untuk membayar atau tidak bayar. Walau bagaimanapun, s 33(4) APK bermula dengan perkataan-perkataan 'save as aforesaid', yang jelas menunjukkan bahawa tidak boleh ada penguatkuasaan penghakiman kewangan terhadap kerajaan. Dalam erti akta lain satu-satunya cara yang diperuntukkan oleh APK untuk mendapat balik jumlah penghakiman adalah dengan mengeluarkan sijil itu, kerana prosiding pelaksanaan biasa tidak ada terhadap kerajaan (lihat perenggan 7, 50, 72, & 92).

(2) (oleh **Abdul Hamid Mohamad KHN** dan **Arifin Zakaria HMP**) Tambahan pula A 73 k 12(1) KMT dengan jelas menyatakan bahawa polisi am undang-undang adalah bahawa pelaksanaan atau proses-proses penguatkuasaan lain tidak terletak pada kerajaan. Dalam perkataan lain, terhadap kerajaan seseorang tidak boleh menggunakan apa-apa prosedur berkaitan penguatkuasaan penghakiman dan perintah yang diperuntukkan oleh A 45 hingga A 52 KMT. Satu-satunya prosedur yang dibenarkan adalah seperti yang diperuntukkan oleh s 33 APK (lihat perenggan 11 & 54).

(3) (oleh **Arifin Zakaria HMP**) Responden hanya memohon bantuan mahkamah untuk membuat kerajaan negeri membayar jumlah penghakiman yang diperoleh sejak tahun 2002. Kronologi peristiwa dalam kes ini jelas menunjukkan bahawa tuntutan untuk bayaran daripada responden tidak mendapat respons daripada kerajaan atau agensinya. Respons ini jelas menunjukkan sikap kurang hormat kerajaan, jika ada, terhadap sijil tersebut. Dalam keadaan tersebut,

mahkamah bukan tidak berupaya atau tidak berkuasa untuk membetulkan apa yang jelas salah dari segi undang-undang. Meskipun tidak terdapat prosiding-prosiding pelaksanaan biasa terhadap kerajaan menurut s 33(4) APK, prosiding-prosiding pelaksanaan tersebut terhad untuk jenis 'execution or attachment' seperti yang dinyatakan dalam A 45 hingga A 52 KMT dan tidak termasuk prosiding semakan kehakiman. Ini kerana jika badan perundangan berniat untuk memasukkan prosiding semakan kehakiman dalam skop s 33(4) APK ia boleh berbuat demikian dengan perkataan-perkataan yang jelas. Memandangkan autoriti-autoriti yang dirujuk jelas menunjukkan bahawa semakan kehakiman terletak terhadap Menteri, perayu sebagai Menteri yang bertanggungjawab tentang hal kewangan adalah sewajarnya bertanggungjawab untuk pembayaran jumlah penghakiman tersebut. Menurut definisi perintah mandamus adalah perintah yang dikeluarkan oleh mahkamah kepada pihak berkuasa untuk melaksanakan tanggungjawab awam yang terletak atasnya oleh undang-undang dan tanggungjawab ini adalah tanggungjawab statutori di bawah s 33(3) APK untuk membayar jumlah penghakiman seperti yang dinyatakan dalam sijil tersebut (lihat perenggan 47, 63, 74, 81–82 & 94–96).

(4) (oleh **Arifin Zakaria HMP**) Kekurangan kewangan bukan alasan untuk tidak membayar jumlah penghakiman itu, kerana perkara 29(2) Perlembagaan Negeri Sabah menetapkan bahawa apa-apa wang yang dikehendaki untuk memenuhi apa-apa penghakiman, keputusan atau award terhadap kerajaan negeri oleh mana-mana mahkamah atau tribunal hendaklah dicajkan dan dibayar daripada dana yang disatukan. Oleh itu, wang itu tidak perlu disediakan melalui bil bekalan, kerana ia boleh dicajkan terus ke dana yang disatukan kerajaan negeri. Oleh itu tidak ada alasan untuk perayu untuk tidak mematuhi sijil yang dikeluarkan di bawah s 33(3) APK (lihat perenggan 96).

(5) (oleh **Abdul Hamid Mohamad KHN**) Perayu meskipun 'member of the administration' bukan 'person holding public office' bagi tujuan s 44 ARS. Ini bermaksud s 44 ARS tidak terpakai kepada perayu dan tidak memberikan mahkamah kuasa untuk membuat perintah terhadap perayu. Setakat itu Mahkamah Tinggi adalah betul dan Mahkamah Rayuan adalah salah dalam pentafsiran s 44 ARS (lihat perenggan 24).

(6) (oleh **Abdul Hamid Mohamad KHN**) Walau bagaimanapun, s 25(2) AMK memperuntukkan kuasa tambahan, iaitu tambahan kepada apa-apa kuasa lain yang diberikan oleh undang-undang bertulis lain dan oleh itu ia boleh menjadi lebih daripada apa yang telah diperuntukkan oleh undang-undang lain dan tidak terhad kepada apa yang diperuntukkan dalam undang-undang bertulis lain. Oleh itu, ia tidak wajar untuk membaca s 25(2) sebagai tertakluk atau terhad kepada apa

yang diperuntukkan dalam APK atau ARS. Dalam perenggan 1 kepada Jadual AMK mandamus dinyatakan sebagai salah satu daripada kuasa-kuasa tambahan yang mungkin boleh dikeluarkan terhadap 'any person or authority' dan ini termasuklah Menteri sebuah kerajaan (lihat perenggan 30–31).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 195–204.

Cases referred to

Abdul Ghani bin Ali @ Ahmad & Ors v PP [2001] 3 MLJ 561 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (refd)

Franklin v The Queen (No 2) [1974] QB 205 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81 (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)

Loh Wai Kong v Government of Malaysia & Ors [1978] 2 MLJ 175 (refd)

M, In re [1993] 3 CLJ 567 (refd)

Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor [2001] 4 MLJ 616 (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301 (refd)

Olive Casey Jaundoo v Attorney-General of Guyana [1971] AC 972 (refd)

Petrojasa Sdn Bhd v Minister of Finance, Government of Sabah [2006] MLJU 171; [2006] 6 CLJ 232 (refd)

R v Lords Commissioners of the Treasury (1871) LR 7 QB 387 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Reg v Powell [1841] 1 QB 352 (refd)

Reg v Secretary of State for Transport, Ex parte Factortame Ltd [1990] 2 AC 85 (refd)

Reg v The Commissioners of Customs and Excise, Ex parte Cook & Anor [1970] 1 WLR 450 (refd)

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325 (refd)

Teh Cheng Poh v PP [1979] 1 MLJ 50 (refd)

Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260 (refd)

Legislation referred to

Constitution of the State of Sabah art 29(2)
Courts of Judicature Act 1964 s 25, 25(2), para 1, Schedule
Federal Constitution arts 13, 32(1), 132(1), 132(3), 150(1), 160
Government Proceedings Act 1956 ss 2, 33, 33(1), 33(2), 33(3), 33(4)
Interpretation Acts 1948 and 1967
Rules of the High Court 1980 O 45, O 46, O 47, O 48, O 49, O 50, O 51, O 51A, O 52, O 53, O 73 r 12, O 73 r 12(1), O 73 r 12(2)
Rules of the Supreme Court [UK] O 48, O 77 r 15(1)
Specific Relief Act 1950 s 44, 44(1), 44(1)(b), 44(10(c), 44(2)

Roderic Fernandez (Mohd Hanafiah bin Mohd Kassim with him) (State Attorney General's Chambers) for the appellant.
Chen Kok On (Peter Lo & Co) for the respondent.

Abdul Hamid Mohamad Chief Justice:

[1] I have had the privilege of reading the judgment of Arifin Zakaria FCJ and I agree with his conclusion. However, I would like to make a few points. As he has narrated the facts and reproduced the relevant provisions of the law under consideration, I shall not repeat nor reproduce the same, except where it is absolutely necessary.

[2] The respondent had obtained a monetary judgment at the High Court at Sandakan against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s 33(1) of the Government Proceedings Act 1956 ('GPA'). The party named in the certificate is the state government of Sabah. As the state government of Sabah did not make payment as required by the certificate, the respondent filed an ex parte application for leave for judicial review for an order of mandamus against the appellant, the Minister of Finance, Government of Sabah, to pay the judgment sum in accordance with said certificate. Leave was granted. The respondent then filed the substantive application for judicial review for the said order. The High Court dismissed the application. On appeal to the Court of Appeal, the court allowed the appeal of the respondent. The appellant, then obtained leave to appeal to this court, on only one issue ie:

> Given that s 33(3), Government Proceedings Act 1956 imposes a statutory obligation on the Government of Sabah to pay according to a certificate issued under s 33(1), Government Proceedings Act 1956, the issue is whether judicial review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a certificate issued under s 33(1), Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the state government of Sabah.

Provided that in the event the Federal Court decides that the Minister of Finance, Government of Sabah is not the proper party in these proceedings the applicant consents that the proper person be joined in these proceedings.

[3] Now, let us look at the overall scheme of the law on the issue.

[4] Section 33(1) of the GPA provides that, in brief and in relation to the facts of this case, where in any civil proceeding against the government, any order is made by any court in favour of any person against the government, the court shall issue to the person a certificate.

[5] Subsection (3) provides that where the order (ie the certificate) provides for the payment of money, the government shall pay to the person entitled the amount stated in the certificate.

[6] Subsection (4) then provides that 'Save as aforesaid no execution or attachment or process in the nature of attachment, shall be issued out of any court for enforcing payment by the government of any such money or costs as aforesaid'.

[7] In other words, the only method provided by GPA to recover a judgment sum is by the issue of the certificate. Ordinary execution proceedings are not available.

[8] This is further strengthened by the provisions of O 73 of the Rules of the High Court 1980 ('the RHC'). Rule 12(1) provides:

(1) Nothing in Orders 45 to 52 shall apply in respect of any order against the Government.

[9] Subrule (2), though not an issue here, makes specific reference of s 33(1) of the GPA.

[10] It must be noted that O 45 to O 52 are orders pertaining to Enforcement of Judgments and Orders (O 45), Writs of Execution: General (O 46), Writs of Seizure and Sale (O 47), Examination of Judgment Debtor, etc (O 48), Garnishee Proceedings (O 49), Changing Orders, Stop Orders, etc (O 50), Receivers: Equitable Execution (O 51), Rateable Distribution (O 51A) and Committal (O 52).

[11] In other words, as against a government one cannot resort to any of the procedures provided by O 45 to O 52. The only procedure allowed is as provided by s 33 of the GPA.

[12] We now come to the question: does mandamus lie in this situation?

[13] Section 44 of the Specific Relief Act 1950 ('the SRA') provides, in brief and in relation to the facts of this case, that a judge may make an order requiring any specific act to be done 'by any person holding a public office'. However, sub-s (2) provides that the section does not authorise a judge:

> (b) to make any order on any servant of any Government in Malaysia, as such, *merely to enforce the satisfaction of a claim upon the Government*; or
>
> (c) to make any order which is otherwise expressly excluded by any law for the time being in force.
>
> (Emphasis added.)

[14] The question is whether this provision prohibits the issue of mandamus. This section speaks of an order that may be made against 'any person holding a public office'. After that it qualifies that an order cannot be made in respect of, inter alia, (b) and (c).

[15] The answer to the question depends on, first, who is a 'person holding a public office'? In *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175, Gunn Chit Tuan J (as he then was) held:

> However, according to sub-s (1) of s 44 of the Specific Relief Act 1956, an order can only be made against any person holding a public office … According to s 3 of the Interpretation Act 1967, 'public officer' means office in any of the public services, and 'public services' means the public services mentioned in art 132(1) of the Federal Constitution. Therefore, the first and second respondents in this case, namely the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri, Malaysia who are not persons holding a public office within the meaning of s 44 of the Specific Relief Act have, in my view, been wrongly cited as the respondents.

[16] In other words, since the Government of Malaysia and the Minister of Home Affairs are not 'persons holding a public office', an order pursuant to s 44 of the SRA cannot be issued against them. Regarding the other two respondents, ie the Ketua Pejabat Imigresen, Pulau Pinang and the Pegawai Paspot, Pulau Pinang even though they were held to be persons holding a public office, nevertheless the order prayed for was refused by the learned judge because the applicant had failed to fulfill the five conditions set out in the proviso to sub-s (1) of s 44 of the SRA.

[17] For purpose of record, in spite of the judgment of the High Court was in favour of the respondents, the respondents (ie the Government of Malaysia and others) appealed to the Federal Court and, as stated by Suffian LP who delivered the judgment of the five-member court, because the learned judge 'in the course of his judgment made certain observations on the law which the Government took objection'. While the Federal Court 'allowed' the appeal and dismissed the cross appeal, the net effect of the judgment of the Federal Court is the same as that of the High Court: the application was dismissed. However, it should be noted that the Federal Court made no reference whatsoever to the interpretation of the words 'any person holding a public office'.

[18] The learned judge of the High Court in the instant case (Linton Albert J) followed the view of Gunn Chit Tuan J and, on that ground dismissed the respondent's application. The Court of Appeal disagreed with the learned judge on this point. The Court of Appeal in a judgment written by James Foong JCA said:

> This, in our view, is a narrow perception of s 44(1) Specific Relief Act. If adopted it would jeopardise the powers of the court to order any Minister of the Government to do or forbear from doing the many administrative acts required of such a person in the government. This would tantamount to practically saying that s 44(1) of the Specific Relief Act does not apply to a Minister in the Government. Perhaps, the learned trial judge had overlooked the great number of authorities where the courts had directed a Minister of the Government to perform or forbear from performing certain specific act. A case in point is that of this court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, where the order of the court was directed at the Minister of Labour and Manpower involved in an industrial relation dispute. In this respect, we are of the opinion that the learned trial judge has erred in his ruling on this point. To us, a Minister of a Government in Malaysia is a person holding a public office under the provision of s 44(1) of the Specific Relief Act.

[19] With respect, I do not agree with the approach and the interpretation given by the Court of Appeal. If words used in statutes are defined, it is that meaning that the court should give to them. It is not right for the court, purporting to give a 'wider interpretation', to give a meaning different from what is defined by statute.

[20] The SPA does not define the words 'public office'. However, 'public office' is defined by the Interpretation Acts 1948 and 1967 (Act 388) ('IA') as follows:

> 'public office' means an office in any of the public services;
>
> 'public officer' is defined as follows:

'public officer' means a person lawfully holding, acting in or exercising the functions of a public office.

[21] What is 'public services'? Article 132(1) of the Federal Constitution provides:

(1) For the purposes of this Constitution, the public services are —

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the police force;

(e) (Repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

[22] Clause (3) provides:

(3) The public services shall not be taken to comprise —

(a) the office of any member of the administration in the Federation or a State; or

[23] 'Member of the administration' is defined in art 160 as follows:

'Member of the administration' means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as a member (other than an official member) of the Executive Council.

[24] It is clear that the Minister of Finance, Government of Sabah is 'member of the administration' but not a 'person holding public office'. What it means, in relation to s 44 of the SRA is that s 44 of the SRA is not applicable to the appellant, meaning that an order under s 44 of the SRA cannot be issued against the appellant. To that extent the High Court judge, Gunn Chit Tuan J, was right in *Loh Wai Kong* regarding the effect of s 44 of the SRA on the Government of Malaysia and the Minister of Home Affairs.

In my view the learned High Court judge in the instant appeal was right in following *Loh Wai Kong* and the Court of Appeal was wrong in its interpretation of s 44 of the SRA.

[25] Since s 44 of the SRA does not apply to the appellant, proviso (b) and (c) become irrelevant.

[26] That being the case, was the High Court judge right when he held that the 'judgment obtained by the [Respondent] cannot be enforced by mandamus against the Minister of Finance of the Government of the State of Sabah'? He did so held because, in his view '… s 33 of the GPA and s 44 of the SRA clearly restrict the wide powers conferred by para 1 of the Schedule to the CJA which must be read together with s 25'.

[27] I have said earlier that the effect of s 33 of the GPA and O 73 r 12(1) of the RHC is that, the only method of enforcing a monetary judgment against a government is by way of obtaining a certificate. I have also come to the conclusion that s 44 of the SRA does not empower the court to make an order provided therein against the appellant. But, what about para 1 of the Schedule to the CJA?

[28] We now come to the provisions of the Courts of Judicature Act 1964 ('the CJA'). First, s 25(2) provides:

> ((2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the issue.

[29] Then para 1 of the Schedule provides:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any others for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[30] These powers are additional powers, ie additional to any other power given by other written laws. Being additional powers they can only be more than, not limited to, what has already been provided by other laws. The proviso to s 25(2) uses the words 'in accordance with any written law or rules of court relating to the issue'. I am of the view that the use of the word 'in accordance' and not 'subject to' merely refers to the procedural aspects. It

A cannot mean limited to what are provided in other written laws. To read that proviso in such a way is to nullify the effect of 'additional powers'. There would be nothing additional. So, what is the point of having the provision? Bear in mind that the CJA was enacted after the Federal Constitution was promulgated and para 1 of the Schedule makes specific reference to the B Constitution ie 'for the enforcement of the right conferred by Part II of the Constitution …'. GPA and SRA were both enacted much earlier even though they have been revised. So, in my view, it is not correct to read s 25(2) as subject to or limited to what are provided by GPA or SRA.

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[31] We shall now look at the provision of para 1 of the Schedule in detail. Mandamus is mentioned as one of the additional powers. It may be issued to 'any person or authority' which, in my view, includes a Minister of a government.

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[32] My brother Arifin Zakaria FCJ has dealt at length, citing authorities to the effect that judicial review lies against a Minister. I shall not repeat. Indeed, the writ of habeas corpus, one of the writs mentioned in para 1 of the Schedule are mostly issued against a Minister. That being the case, I am of the E opinion that mandamus may be issued against the appellant.

[33] Paragraph 1 of the Schedule of the CJA itself provides that mandamus may be issued 'for the enforcement of rights conferred by Part II of the Constitution, or any of them …'.

F

[34] Article 13 which is the last article in Part II of the Federal Constitution provides:

G (1) No person shall be deprived of property save in accordance with law.

[35] In other words, mandamus may issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance H with law. Here, the respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying, clearly the State Government of Sabah has deprived the respondent of its property contrary to law.

I

[36] Furthermore, para 1 of the Schedule of the CJA goes on to provide 'or for any purpose'. This is even wider.

[37] It is, therefore, clear to me that mandamus lies against the appellant.

[38] I would dismissed the appeal with costs. A

Arifin Zakaria FCJ:

BACKGROUND FACTS B

[39] By Suit No S22–02 of 1999 action was commenced against the State Government of Sabah ('the state government') for breach of an agreement entered into by the respondent and the state government. On 1 April 2002, judgment was obtained by the respondent. On 20 May 2004, a certificate C under s 33(3) of the Government Proceeding Act 1956 ('the GPA') was issued by the deputy registrar of the High Court ordering the state government:

(a) to pay the respondent as damages for breach agreement the sum of RM6,163,497.44 with discretionary interests at the rate of 4% per D annum on the said judgment sum from the date of the writ of summons to the date of judgment together with statutory interest at the rate of 8% per annum on the said judgment sum from the date of judgment to the date of full settlement; and

(b) to pay the respondent as costs of the sum of RM405,311.55 and E interest thereon at the rate of 8% per annum on the said sum from the date of judgment until the date of payment.

[40] The certificate was duly served on the chambers of State Attorney F General and State Secretary of Sabah but the state government failed to pay up the said sum. The respondent then filed this application for an order of mandamus pursuant to O 53 of the Rules of the High Court 1980 ('the RHC'), citing the Minister of Finance, Government of Sabah as the respondent (the appellant before us). G

[41] The High Court, on 27 April 2006, dismissed the respondent's application with costs. On appeal to the Court of Appeal sitting in Kota Kinabalu, Sabah on the 7 February 2007 the appeal was allowed. This court on 26 June 2007 granted leave to the appellant to appeal to this court. The question as framed for the determination of this court reads as follows: H

> Given that s 33(3), Government Proceeding Act 1956 impose a statutory obligation on the Government of Sabah to pay according to a Certificate issued under s 33(1), Government Proceedings Act 1956, the issue is whether judicial review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a Certificate issued under s 33(1), Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the Government of Sabah. I

Provided that in the event the Federal Court decides that the Minister of Finance, Government of Sabah is not the proper party in these proceeding the applicant consents that the proper person be joined in these proceedings.

[42] To put it shortly the single issue is whether judicial review proceedings may be taken against the appellant, to compel payment of a judgment sum as certified in the certificate issued under s 33(1) of the GPA.

THE DECISION OF THE HIGH COURT

[43] The High Court dismissed the application (see *Petrojasa Sdn Bhd v Minister of Finance, Government of Sabah* [2006] MLJU 171; [2006] 6 CLJ 232). The learned judge held that s 33(3) of the GPA is subject to sub-s (4), not only because the letter followed immediately after and qualified the former, but more importantly, because to hold otherwise would render the parenthesis in sub-s (3) redundant or otiose. It thus followed that the application is prohibited by s 33(4) of the GPA which clearly envisaged the prohibition of the order prayed for by the respondent. In his judgment the learned judge stated:

> While I have no problem accepting the view that s 33(3) operates to impose a statutory obligation on the state government, it would be perverse in my view, to go on to suggest that the court is entitled to direct or order compliance because there is no basis for imputing that into the subsection. I think, the view expressed by Shaw J in *Franklin v The Queen* [1973] 3 All ER 861 at p 867 would shed some light on the fallacy of the argument advanced on behalf of the applicant:
>
> > I have ventured to express the view that it was unnecessary to go beyond stating that the sum in question was due and that the applicant was entitled to be paid. The reference to the registrar was, so it seems to be, otiose. The mode of bringing about a satisfaction of the judgment is a matter of statutory prescription and not of judicial direction or order.

[44] The underlying reasons for his rejection of the respondent's application are found in the following passage:

> Encik Hanafiah Kassim argues that s 33(3) of the GPA is subject to sub-s (4). I think that is the correct view, not only because the latter follows immediately after and qualifies the former but more importantly, because to hold otherwise would render the parenthesis in sub-s (3) redundant or otiose and that could not have been the intention of the legislature. It follows, therefore, that the application is prohibited by s 33(4) by virtue of these operative words '… no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government …' which clearly envisage prohibition of the order asked for by the applicant because 'process' in sub-s (4) of s 33 of the GPA has been defined thus:

> 'Process' may signify the means whereby a court compels a compliance with its demands. (See *Words and Phrases* — legally defined (3rd Ed, Vol 3 John B Saunders)
>
> 'Process' A form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. The process of the Supreme Court of Judicature consist of writs (qv), originating summonses (qv), motion (qv) and petition (qv) …

(see *Osborn's Concise Law Dictionary* (18th Ed) at p 264 and the RHC O 5 to O 10).

That would have been enough to dispose of the application but for the sake of completeness I shall revert to the statutory provisions set out above upon which this application rests. Section 44(1) of the SRA is of no assistance to the applicant because the respondent is not a 'person holding a public office'. *Loh Wai Kong v Government of Malaysia* [1978] 2 MLJ 175 is an authority relied on by the learned Senior State Counsel, and in my view rightly so.

THE DECISION OF THE COURT OF APPEAL

[45] The Court of Appeal in a unanimous decision allowed the appeal by the respondent, thus allowing the respondent's application for judicial review and the appellant was directed to make payment within 21 days from the date of the order in the motion, that is 23 April 2007.

[46] The Court of Appeal was of the view that s 33(4) of the GPA, and s 44(1) of the SRA and O 73 r 12 of the RHC are no impediments to the respondent's application. The underlying reasons are found in the following passage:

> This, in our view, is a narrow perception of s 44(1) Specific Relief Act. If adopted it would jeopardise the powers of the court to order any Minister of the Government to do or forbear from doing the many administrative acts required of such a person in the government. This would tantamount to practically saying that s 44(1) of the Specific Relief Act does not apply to a Minister in the Government. Perhaps, the learned trial judge had overlooked the great number of authorities where the courts had directed a Minister of the government to perform or forbear from performing certain specific act. A case in point is that of this court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, where the order of the court was directed at the Minister of Labour and Manpower involved in an industrial relation dispute. In this respect, we are of the opinion that the learned trial judge has erred in his ruling on this point. To us, a Minister of a Government in Malaysia is a person holding a public office under the provision of s 44(1) of the Specific Relief Act.
>
> We shall now discuss the exception proper. From the appellant's application, the order for mandamus sought is to direct the respondent to perform his duty according to s 33(3) of the GP Act, and that is 'to pay to the person entitled or his

solicitor the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon'. But it is the contention of the respondent that by virtue of this exception in s 44(2)(b) of the Specific Relief Act, the learned High Court judge has no power to do so. Indeed, we agree that by virtue of this subsection the judge is precluded from issuing such orders against the respondent 'merely to enforce the satisfaction of a claim upon that government' by it does not preclude the judge from directing the respondent by way of mandamus to perform a duty under the law. And this duty is to comply with s 33(3) of the GP Act which the government, by virtue of this provision, is required under the law to pay the appellant. To us, this is not to enforce the satisfaction of a claim upon the government but a direction to a public servant of that government to perform a duty required by law of that government. This is a harmonious and reconciliatory reading of s 44(2)(b) of the Specific Relief Act with s 33(3) of the GP Act. Otherwise, the effectiveness of s 33(3) of the GP Act would be reduced to a nullity particularly when the government, as an entity, can only act through its public servant.

THE ISSUES

[47] The respondent is merely seeking the assistance of the court to get the state government to satisfy the judgment sum which was obtained way back in the year 2002. Ordinarily, the procedure to be followed is set out in s 33 of the GPA which reads as follows:

(1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person

for the time being named in the record as the advocate for the Government or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

[48] In the present case it is not in dispute that the respondent had complied with the provisions of the said s 33 but no payment was forthcoming from the appellant. In the light of that the respondent applied to the court by way of judicial review for an order of mandamus to direct the appellant to make payment of the judgment sum. In respond the appellant contends that the judicial review does not lie against the appellant to enforce payment of a judgment sum for to allow such an application would tantamount to allowing enforcement proceeding to be taken against the state government through the back door.

[49] There is no dispute that under sub-s (3) of s 33 of the GPA the appellant is legally obliged to satisfy the judgment sum. This is conceded by the learned State Attorney General, appearing for the appellant. But having said that he then argued that the said subsection is expressly subjected to the words in the parenthesis which reads 'subject as hereinafter provided', as contained in the said subsection. In other words the provisions of sub-s (3) has to be read subject to such impediment or restriction as may thereafter be provided.

[50] Such an impediment is found in sub-s (4) of the s 33 which states in clear terms that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the government of any such money or costs as aforesaid and no person shall be individually liable under any order for the payment by the government or any officer of the government as such, of any such money or costs. The subsection opens with the words 'save as aforesaid' which clearly indicate that any enforcement of money judgment against the government can only be proceeded with in accordance with the provisions as provided earlier. In short the ordinary procedure for enforcement of judgment as between subjects does not apply to the government. The word 'government' here by definition includes the state government as in the present case (see s 2 of the GPA). In my view the words in the parenthesis in sub-s (3) and as further fortified by the opening words of sub-s (4) clearly support the appellant's contention that the ordinary enforcement procedures available as between subjects do not and could not apply to the government.

[51] The Court of Appeal in its judgment was of the opposite view. It said that the qualifying words of 'save as aforesaid' in sub-s (4) of s 33 of the GPA must be intended to cater for the preceding subsections to mean that execution, attachment or process in the nature thereof for enforcing payment by the government or its officer can only be instituted after s 33(1), (2) and (3) of the GPA are satisfied. But after having done so then the prohibition as contained in sub-s (4) would not act as an impediment to the granting of the order prayed for by the respondent.

ORDER 73 RULE 12 OF THE RHC

[52] The further impediment against this application by the respondent is found in O 73 r 12(1) of the RHC which reads:

> (1) Nothing in Orders 45 to 52 shall apply in respect of any order against the Government.

[53] Orders 45 to 52 of the RHC relate to enforcement of judgment and orders.

[54] Therefore by O 73 r 12(1) it is clear that the general policy of the law is that execution or other process of enforcement do not lie against the government.

[55] In the case of *Franklin v The Queen (No 2)* [1974] QB 205 (CA), O 77 r 15(1) of the English Rules of Supreme Court (in pari materia to our O 73

r 12(1) of RHC) was considered by the court. In that case Franklin applied to examine the Bank of England (as the registrar) pursuant to the English Rules of the Supreme Court, O 48 (in pari materia to our O 48 of the RHC).

[56] The master granted the order but it was set aside by Shaw J and on appeal the decision of Shaw J was affirmed by the Court of Appeal. In reference to the said order, Shaw J remarked:

> That reflects the general policy of the law that execution or other process of enforcement cannot go against the Crown for it could be derogatory of the royal dignity if it were otherwise. If O 77 r 15(1) applies to the judgment obtained by Mr Franklin it must be clear that any process founded upon the provisions of RSC, O 48, would not be competent.

[57] In *Olive Casey Jaundoo v Attorney-General of Guyana* [1971] AC 972, (the subject matter of the claim does not concern us) the Privy Council in allowing the appeal and remitting the case to the courts of Guyana for disposal on the merit made the following observation:

> … alternatively, following the precedent of the Crown liabilities Act 1888 of South Africa and the Crown Proceedings Act 1947 of the United Kingdom, the High Court could make an order for payment against the Government of Guyana, but accompanied by a further order that 'no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing the payment by the Government of Guyana of any such money or cost'.

[58] Their Lords expressed the view that an order in either of these forms would be complied with by the Government of Guyana (see also *Ng Kim Moi (P) & Ors v Pentadbir Tanah & Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301), wherein Gopal Sri Ram JCA in his dissenting judgment held that the acquisition in dispute was null and void but instead of setting aside the acquisition awarded the appellants reasonable compensation, and following *Jaundoo*'s case stated 'that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing the payment by the respondent of any such money or costs'.

[59] To put it shortly by virtue of O 73 r 12 of the RHC none of the ordinary method of execution as contained in O 45 to O 52 would apply against the government.

JUDICIAL REVIEW PROCEEDINGS

[60] That explains the need for this application. It was taken up by the respondent after failing to get any positive respond from the appellant for the

payment of the judgment sum as per certificate of judgment sum and order for costs dated 20 May 2004. The said certificate having been duly served on the State Attorney General's Chambers and the State Secretary of Sabah by letters dated 21 May 2004 and 29 March 2005 respectively. This was never disputed by the respondent. The single issue before us is whether an order of mandamus would lie against the appellant in the light of the legislative inhibitions discussed in the earlier part of this judgment.

[61] The Court of Appeal in its judgment reversing the decision of the learned High Court judge held that there is no legal impediment for an order of mandamus to be issued against the respondent. The respondent contends otherwise. The relief sought by the respondent is for an order of mandamus under s 25 and para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') and for/or under s 44 of the Specific Relief Act 1950 ('the SRA'). The order sought for is directed to the appellant to perform his statutory duty under s 33(3) of the GPA, that is, to satisfy the judgment sum as certified under the certificate dated 20 May 2004.

[62] The issues at the heart of this appeal are: (a) whether an order of mandamus would lie against the appellant in this present case; (b) whether there exist a statutory duty on the appellant to pay arising from s 33(3) of the GPA.

[63] On the first issue, by definition an order of mandamus is a command issued by the court to an authority to perform a public duty placed upon it by law. The learned High Court judge in his judgment held that in the present case an order of mandamus cannot be made against the appellant on two main grounds. One of them is that s 44(1) of the SRA is directed towards '… Person holdings a public office' and on the authority of *Loh Wai Kong v Government of Malaysia* [1978] 2 MLJ 175, he held that the appellant is not a person holding a public office. The term 'public officer' is not define in the SRA and the learned judge in *Loh Wai Kong* relied on the definition of the words as appearing in the Interpretation Act 1967 (Now Part I of Interpretation Acts 1948 and 1967 (Act 388)). However, the learned High Court judge failed to consider that in this case the application was made pursuant to both s 44(1) of the SRA as well as s 25 and para 1 of the Schedule to the CJA.

[64] Section 25(2) of the CJA reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[65] The Schedule provides:

SCHEDULE

Section 25(2)

ADDITIONAL POWERS OF HIGH COURT

1 Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[66] As noted by Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481, at p 541:

> I now turn to consider the second and perhaps wider basis of the High Courts' power in the field of public law remedies. It is paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (the Schedule) …

[67] As correctly stated the powers conferred by the Schedule upon a High Court are, according to its terms, 'additional powers', that is to say, powers in addition to those already seised of by that court. Resort may therefore be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law. This is precisely the approach taken by the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, where it relied upon para 6 of the Schedule to found the necessary jurisdiction.

[68] In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Edgar Joseph Jr FCJ at p 195 observed that:

> ... that supervisory review jurisdiction is a creature of the common law and is available in the exercise of the courts' inherent power but its extent may be determined not merely by judicial development but also by legislative intervention.

[69] And it has been suggested, and I agree with it, that this power cannot be curtailed by the RHC (see *Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor* [2001] 4 MLJ 616). On the above premise I would hold that this application may properly be made pursuant to the power of court under s 25 and paragraph 1 of the Schedule to the CJA.

THE MERIT OF THE APPLICATION

[70] I will now consider the merit of this application. The respondent

A contends that s 33(3) of the GPA on its proper construction creates a statutory duty on the part of appellant to pay the respondent the amount appearing on the certificate to be due to it together with the interest due thereon. This duty, learned counsel for the respondent contends, arose from the use of the mandatory word 'shall' in the said subsection. The appellant on
B the other hand contends that the word 'shall' here is merely directory in effect and not mandatory. I agree that the word 'shall' in a statute such as this may carry one of the two meanings as contended. Its true meaning may be obtained by considering the context in which it is used. Here the certificate is issued pursuant to sub-s (1) of s 33 in the circumstances where an order was
C made by any court in favour of any person against the government or against any officer of the government. The certificate really is an alternative mode of enforcement of judgment against the government. Like in the instant case judgment had been obtained against the state government as early as 1 April
D 2002 and a certificate under s 33(3) of the GPA was issued on 20 May 2004. Therefore, the certificate is premised on the judgment of court of law, which is binding on the state government. In that context it cannot be seriously argued that the word 'shall' is merely directory and not mandatory in effect. HWR Wade and CF Forsyth in *Administrative Law* (7th Ed) at p 836 stated:

E

> The Act (referring to the Crown Proceedings Act 1947) also exempts the Crown from the compulsory machinery of law enforcement. This is not in order to enable the Crown to flout the law, but because it would be unseemly if, for example, a sheriff's execution could be issued against a government department which failed
F to satisfy a judgment. For the purposes of the Act the Crown must be treated as an honest man, and the ordinary laws must have their teeth drawn. Therefore the Act provides that no execution or attachment or process shall issue for enforcing payment by the Crown.

G

[71] Thus it must be brought to bear on the state government that the GPA is not there to enable the government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceeding being taken against the state government. I think it is reasonable
H to expect the state government to act with honour and responsibility and the appellant in the present case is no exception. I do not wish to go into the issue why the state government had acted the way they did in the present case. It is never in dispute that the respondent is in law entitled to the judgment as specified in the certificate. Therefore, I agree with the respondent that in the
I context of s 33(3) of the GPA the word 'shall' connotes an obligation to pay. The fact that in s 33(3) of the GPA it is provided that 'pending an appeal or otherwise' the government may apply for a stay or suspension of the payment, would go to further strengthen the respondent's contention. Had the duty to pay not being mandatory in nature there is no necessity for the government

to apply for a stay or suspension of payment. For the above reasons I am satisfied that in the context of s 33(3) of the GPA the word 'shall' obtaining therein is obligatory in effect.

[72] On that premise I am of the view that once a certificate is issued under s 33(1) of the GPA and duly served on the state government it is then obligatory on the state government to make the necessary payment. In other words s 33(3) of the GPA creates a statutory duty on the part of the state government to pay the amount as certified. The next question is whether an order of mandamus may be issued against the Minister of Finance, Government of Sabah, the appellant in the present case directing the appellant to pay the sum as stated in the certificate.

[73] The learned State Attorney General, contends that the appellant is not amenable to the order of mandamus. Among other grounds relied by him in support of his contention is s 33(4) of the GPA which states:

> (4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

[74] He contends that the words '… or process in the nature thereof …' would include the order of mandamus otherwise he says the process would be open to abuse and the respondent would be able to enforce the payment of the judgment sum through the back door. Having given the matter due consideration I am persuaded to think that those general words must be interpreted *ejusdem generis* with the preceeding words. Applying the said approach, I am of the view that the words '… process in the nature thereof …' found in s 33(4) of the GPA must be limited to the type of 'execution or attachment' obtaining in O 45 to O 52 of the RHC and do not include judicial review proceedings. I believe that, had the Legislature intended to include judicial review proceedings within the scope of s 33(4) of the GPA it could have done so in clear words. In *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 at p 93, the Federal Court explicitly stated the principle that:

> … it seems clear that judicial review which is essentially a creature of common law, can be excluded by statutory legislation if the words used are unmistakably explicit.

[75] And at p 95 it says:

Given the established authorities referred to, it cannot be said that the Federal court in *Sugumar Balakrishnan* has broken any new ground in determining the extent and scope of ouster clauses. There is no paradigm shift. It has followed entrenched principles which can effectively be summed up as follows: that an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause.

[76] In *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325, the Court of Appeal at p 333 stated:

> We now turn to consider the position after 1948. It is axiomatic the Crown Proceedings Act 1948 was passed to improve the position of the citizen vis-a-vis his or her rights against the Crown. As Professor Wade in his article *Injunctive Relief against the Crown and Ministers* [1991] 107 Lq R 4 at 6 says:
>
> > The Crown Proceedings Act 1948 was a remedial statute, designed to put the Crown, so far as it could properly be done, into the position of an ordinary litigant, so that justice could be done without obstruction by the Crown's ancient immunities. As Lord Jauncey said in *British Medical Association v. Greater Glasgow Health Board* [1989] AC 1211 (where, incidentally, Lord Diplock's Town Investment (*Town Investment Ltd v Department of the Environment* [1978] AC 359) dicta were once again disregarded), 'the general purpose of the Crown Proceedings Act was to make it easier rather than more difficult for a subject to sue the Crown', and the extension of immunities would 'run wholly counter to its spirit'.

[77] In that case the Court of Appeal held, inter alia, that the courts have jurisdiction to grant interim and permanent injunctions against any servant of the government. It also held that it is too late in the day to argue that s 29 of the GPA bars the grant of an interlocutory or even an interim injunction against the government. That is not the issue before us, as such I would not venture to say anything more on this save that the courts have moved away from the traditional stand that no order of injunction may be granted against the government.

[78] The position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong. Therefore, the courts in the Commonwealth jurisdictions generally have held that the executive arms of the government is amenable to the judicial review proceedings. In the landmark case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at p 953 Lord Roskill said:

> Historically the use of the old prerogative writs of certiorari, prohibition and mandamus designed to establish control by the court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, *has become far more extensive*. They have come to be used for the purpose of *controlling what would otherwise be unfettered executive action whether of central or local governmen*t … this branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that *executive action will be the subject of judicial review on three separate grounds* …
>
> (Emphasis added.)

[79] In the local case of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 the Privy Council intimated that even though under art 32(1) of the Federal Constitution the Yang di Pertuan Agong is immuned from any proceedings whatsoever in any court, therefore, an order of mandamus would not lie against his Majesty but that would not prevent a mandamus be granted against the members of the Cabinet requiring them to advise the Yang di Pertuan Agong to act in a certain way.

[80] In *Abdul Ghani bin Ali @ Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561, the Federal Court adopted the view of the Privy Council that in so far as art 150(1) of the Federal Constitution is concerned, the Yang di Pertuan Agong has to act on the advice of the Cabinet.

[81] Reverting to the issue in the present case, it would appear that under s 33(4) of the GPA the government is excluded from the ordinary enforcement procedure but on the other hand by s 33(3) of the GPA the government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s 33(3) of the GPA is clearly a statutory duty which is binding on the state government.

[82] The appellant in the present case, as the Minister in charge of financial matters for the state is naturally responsible for the payment of the judgment sum. An order of mandamus may, in the circumstances, be issued to enforce such a compliance by the appellant. This proposition flows from the judgment of Lord Denning in *Franklin v The Queen*, where the judgment creditor took out a summons under O 48 of the English RSC to examine the relevant officer of the Government of Southern Rhodesia to determine the financial resources available to the government to satisfy his judgment. Shaw J set aside the order of the master granting such leave on the premise that it was barred by the English equivalent of our O 72 r 12 and his decision was affirmed by the Court of Appeal.

[83] Lord Denning said at p 217:

> If it is found in those proceedings that there are any moneys available in addition to the £41, one can be quite sure that the Bank of England will pay them over in accordance with the statute. *If they did not do so, a mandamus would lie to compel them.*
>
> (Emphasis added.)

[84] At p 218 he made the following observation:

> That is enough to decide this case. But I would add this: in my opinion RSC, O 48 r 1, applies only to judgments or orders as between subjects. It has no application whatever to petitions of right against the Crown. A decision on a petition of rights is not a 'judgment or order for the payment … of money'. It is not a mandatory order. It is more in the nature of a declaratory order that a person is entitled to particular moneys. It has never had to be enforced by means of a writ of execution. *It is always presumed that, once a declaration of entitlement is made, the Crown will honour it. And it has always done so.* Furthermore the Crown is not a 'judgment debtor' in any sense of the words. In addition, RSC, O 77 r 15, says that nothing in Orders 45 to 52 — which include O 48 — shall apply in respect of any order against the Crown.
>
> (Emphasis added.)

[85] In the United Kingdom it is settled law that the Crown has a duty to obey the law as declared by the courts (see *Reg v Secretary of State for Transport, Ex parte Factortame Ltd* [1990] 2 AC 85). Likewise in Malaysia the government, be it the Federal Government or the state government, is subordinated to the law. As His Royal Highness Azlan Shah FCJ (as he then was) candidly stated in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concept: One of them is that the individual has certain fundamental rights upon which not even the power of the state may encroach. The second is the distribution of sovereign power between the state and the Federation, that the 13 states shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

[86] On the power to enforce the law by injunction or contempt proceedings against a Minister the House of Lords speaking through Lord Templeman in *In re M* [1993] 3 CLJ 567 at p 571 stated:

> My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a Minister in his official capacity would, if upheld, established the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

[87] On the question of whether the prerogative remedies could be obtained against the named Minister of the Crown, Lord Woolf in his speech observed as follows:

> The prerogative remedies could not be obtained against the crown directly as was explained by Lord Denman CJ in *Reg v Powell* (1841) 1 QB 352:
>
> > … both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment.

[88] Originally this difficulty could not be avoided by bringing the proceedings against named Ministers of the Crown (*R v Lords Commissioners of the Treasury* (1871) LR 7 QB 387). But, where a duty was imposed by statute for the benefit of the public upon a particular Minister, so that he was under a duty to perform that duty in his official capacity, then orders of prohibition and mandamus were granted regularly against the Minister. The proceedings were brought against the Minister in his official name and according to the title of the proceedings by the Crown. The title of the proceedings would be *Reg v Minister, Ex parte* the applicant (as is still the position today), so that unless the Minister was treated as being distinct from the Crown the title of the proceedings would disclose the 'incongruity' of the Crown suing the Crown. This did not mean that the Minister was treated as acting other than in his official capacity and the order was made against him in his official name. In accordance with this practice there have been numerous cases where prerogative orders, including orders of prohibition and mandamus, have been made against Ministers. This was accepted by Mr Richards as being the position prior to the introduction of judicial review and I will merely refer to one authority, *Reg v The Commissioners of Customs and Excise, Ex parte Cook & Anor* [1970] 1 WLR 450 (which was not cited in Factortame) to illustrate the position, Lord Parker CJ described the then situation of which he had great experience (at p 455). He said:

> Accordingly, one approaches this case on the basis, and I confess for my part an alarming basis, that the word of the Minister is outweighing the law of the land. However, having said that, one moves on to the far more difficult question whether mandamus will lie. It is sometimes said as a general proposition that mandamus will not lie against the Crown or an officer or servant of the Crown. I think we all know in this day and age that that as a general proposition is quite untrue. There

have been many cases, of which the most recent is *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 in which a mandamus was issued to a Minister. Indeed, that has always been the case, as can be seen since as long ago as 1850 when in *Reg v Commissioners of Woods, Forests, Land, Works and Buildings, Ex parte Budge* (1850) 15 QB 761, Sir Fredrick Thesiger expressed the proposition in argument in this form, at p 768:

> Whenever a person, whether filling an office under the crown or not, has a statutory duty towards another person, a mandamus will lie to compel him to perform it.

Those words of Sir Frederick Thesiger were in fact adopted by Cockburn CJ.

There are, of course, cases in which it has been held that a servant or officer of the Crown may have as his only duty a duty towards the Crown. That, indeed, was the deciding factor in *Reg v Lords Commissioners of the Treasury* (1872) LR 7 QB 387; but equally there are other cases, for example, *Rex v Income Tax Special Purposes Commissioners, Ex parte Dr Barnado's Homes National Incorporated Association* [1920] 1 KB 26, and the well known case of *Reg v Income Tax Special Purpose Commissioner* (1888) 21 QBD 313, which show quite clearly that where by statute an officer or servant of the Crown has also a duty towards a member of the public, then provided that member of the public has a sufficient interest, mandamus will lie.

[89] The above quoted observation in my opinion equally applies to us. Relying on the power as conferred on the High Court by para 1 of the Schedule of the CJA which is described as additional powers of the High Court, the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, at p 542 referring to the said Schedule stated:

> The powers conferred by the Schedule upon a High Court are, according to its terms, 'additional powers', that is to say, powers in addition to those already seised of by the court. Resort may therefore be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law. This is precisely the approach taken by the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, where it relied on para 6 of the Schedule to found the Mareva jurisdiction.

[90] At p 543, the learned judge opined:

> Third, it is plain that Parliament intended that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies. That intention finds expression in the word 'including' which has been interposed between the phrase 'directions, orders or writs' and the phrase 'writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others'. So too, the phrase 'or for any other purpose', with which the paragraph concludes, makes clear the wide area in which the remedies are to

operate. These matters, in my judgment, reflect the conferment of a wide power upon the High Court in the matter of public law remedies. A

[91] At p 545 the learned judge concluded by saying:

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> Here, as earlier observed, the Minister had but two alternatives open to him. He could either refer or decline to do so. He elected the latter course and exhausted so much of the power as distinctly relates to that choice. So, all that is left is the power to refer, which, I am satisfied, is amenable to mandamus. In the circumstances, I am unable to accede to the submissions of counsel directed against the order of mandamus made by the learned judge. C

[92] From the above, the position in law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus. D

E

[93] The next question is, should the court in the present case grant such an order. This will turn on the facts and circumstances of each individual case. The chronology of the case shows that, the judgment was dated 1 April 2002 and the certificate under s 33(3) of the GPA was issued on 20 May 2004. It was duly served on the State Attorney General's Chambers vide letter of 21 May 2004. The State Secretary Sabah, was also served with the Certificate vide letter of respondent's solicitors dated 29 March 2005. F

[94] These demands for payment received, what I would say, an indifferent response from the government or its agency. The Under Secretary Monitoring Public Agencies and State Investment Section to the Ministry of Finance of the state government in his affidavit in opposition filed in these proceedings stated: G

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> In any event, despite the existence of the said judgment the respondents undertakes to make payment to the principle sum and thereat the interest payable as soon as funds is made available without prejudice as to any possibility for an amicable settlement that may be available and which is acceptable to the applicant.

I

[95] The response is a clear reflection of the little respect, if any, that the government has for the certificate. The learned High Court judge in his judgment expressed his disapproval over the conduct of the state government in the following words:

A The applicant is not alone because there are others who have variously obtained judgments, decisions or awards against the Government of the State of Sabah which remain barren to this day. I do not propose to speculate on how much longer the Government of the State of Sabah can continue to defy the law and play the ostrich before it undermines the basis of its very existence. I would certainly eschew a discussion on the wisdom, or lack of it, of the abject recalcitrance of the Government of the State of Sabah in these circumstances. I need not say more, except lament the hollowness of the salutary expression of Lord Denning in *Franklin* at p 871 — 'It is always presumed that, once a declaration or entitlement is made, the Crown will honour it. And it has always done so'. — and my misfortune in being placed in a situation where the court is helpless to put right what is clearly an unmitigated wrong.

[96] But, for the reasons given above, I disagree with the learned judge that the court is helpless or powerless to put right what is plainly wrong in law. Lack of fund is no excuse, as the Constitution of the State of Sabah in art 29(2) stipulates that any moneys required to satisfy any judgment, decision or award against the State by any court or Tribunal shall be charged and paid out of the consolidated fund. Therefore, the money need not be provided for through any supply bill, as it is chargeable directly to the state's consolidated fund. In the final analysis I find no excuse whatsoever for the appellant not to comply with the certificate issued under s 33(3) of the GPA.

CONCLUSION

[97] For the above reasons I am of the view that there are ample grounds in support of this application, therefore, in the circumstances I agree with the Court of Appeal that an order of mandamus be issued against the appellant. Accordingly I would, therefore, dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by K Nesan